

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & SALLY SCAIFE,
Complainants

v.

DOCKET NO. 08-SEM-03365

FLORENCE PIZZA FACTORY CORP,¹
D/B/A PIZZA FACTORY &
MUSTAFA IBIC,
Respondents

Appearances:

Alfred P. Chambers, Esq., for Sally Scaife

Benjamin A. Barnes, Esq., for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about November 12, 2008, Complainant Sally Scaife filed a complaint with this Commission charging Respondents with discrimination on the basis of gender and pregnancy, in violation of MGL c. 151B§4, 1 and M.G.L.c.149, §105D. Specifically, Complainant alleges that Respondents terminated her employment because of her pregnancy. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. Respondents moved to dismiss the case for lack of jurisdiction on the basis that they employed fewer than six employees and were not employers

¹ The complaint is amended to include the correct name of the corporate Respondent.

within the meaning of M. G. L. c.151B,§1. Complainant opposed the motion and the issue was reserved for public hearing. A public hearing was held before me on October 17, 2011. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Sally Scaife resides in E. Hampton, Massachusetts with her boyfriend and their child. Complainant is currently employed as a certified medical assistant. Complainant worked for Respondents as a cashier from April, 2008 to September 16, 2008.

2. Respondent, Florence Pizza Factory Corp, d/b/a Pizza Factory, is a restaurant located in Florence, Massachusetts that is primarily a take-out and delivery business serving pizza, sandwiches and the like. Respondent Mustafa Ibic is the sole owner and operator of Florence Pizza Factory, Inc. Ibic immigrated to the United States from Turkey in the 1990s and speaks little English.² Complainant testified that she was able to communicate with Ibic through gestures and a few English words.

3. Complainant's duties at the Pizza Factory included answering the telephone, taking orders, conducting cash transactions and assisting in pizza making. In addition, Complainant swept or mopped the floor, picked up chairs, folded pizza boxes and on occasion, made deliveries. The restaurant's hours of operation were 11:00 a.m. until 10:00 or 11:00 p.m. Complainant worked both day and night shifts.

² Translators Gerken Cilam and Guliz Belcher served as Turkish translators for Ibic at the public hearing.

4. Complainant testified that Ibic was her direct supervisor and in his absence, she believed Gabino, a cook, to be her supervisor. She never received any oral or written warnings about her performance and Ibic often told her she was doing a good job. I credit her testimony.

5. Christopher Graham worked on and off for Respondents. He often worked at a saw mill during the day and at the restaurant at night. Graham was a delivery driver, and also assisted Ibic with paperwork, hiring, firing and cleaning. Graham made the work schedule and testified that he was the manager when Ibic was not present. Graham has not worked for Respondents for the past year and a half.

6. In April 2008, Complainant learned she was pregnant. She initially told only a female co-worker who was also pregnant at the time. Several months later, Complainant informed Gambino of her pregnancy. Graham testified that he learned of Complainant's pregnancy in July 2008.

7. Ibic visited Turkey for approximately six weeks in July and August 2008. Complainant testified that when Ibic returned to the restaurant in approximately mid-August 2008, Complainant informed him of her pregnancy and showed him an ultrasound picture of her baby. She testified that Ibic responded, "Yes, I know. Good." She told Ibic that she planned to work until a week before her due date in December 2008.

8. Complainant testified that several weeks later, as her pregnancy became more visible, Ibic's attitude toward her changed. He instructed her not to mop floors, sweep or do any lifting because such tasks were not good for her or the business. She explained that she was able to perform such tasks; however, Ibic would cut her short when they discussed her duties and he

became frustrated and threw pots and pans. Complainant acknowledged that Ibic was angry and frustrated with other employees as well. I credit her testimony.

9. Complainant testified that Ibic repeatedly told her she was getting too big. He pointed to the microwave to indicate she was that large. Ibic told her she could only work two more weeks because the baby was expected. Complainant testified that she was not due until December, had a healthy pregnancy and there was no reason to restrict her duties. I credit her testimony.

10. Complainant testified that when her employment began, she worked 40 to 42 hours per week, earned \$7.00 per hour and made approximately \$20.00 in tips per shift, an amount that never varied.

11. I do not credit Complainant's testimony regarding the number of hours she initially worked. Respondent's payroll records show that Complainant averaged 21.28 hours per week from April through July 2008. (Ex. R-4) From April through July 2008, Complainant's average weekly wage was \$148.96; plus (estimated) tips of \$100.00 (\$20 per shift x 5 shifts per week) for a total average weekly wage of \$248.96.

12. In August, Respondents began to reduce Complainant's hours and by approximately August 15, her shifts were reduced to three or four short shifts per week. I credit her testimony that her hours decreased in August and September. Respondent's payroll records indicate that the number of hours Complainant averaged per week in August was 16.56 and in September, 12.2. (Ex. R-4) For the period from August through September, 2008, Complainant earned \$677.25 in wages and an estimated \$400.00 in tips for a total of \$1,077.25.

13. During the last week of August 2008, Complainant began a full-time, nine-month medical assistant training program at the Branford Hall Career Institute in Springfield. She intended to continue working part-time evenings at Pizza Factory while attending school.

14. Complainant testified that on September 16, 2008, Ibic directed her not to come in for the next shift because she was having a baby in two weeks and was too big. At the time, Complainant was only six months pregnant and was not due until December. I credit her testimony.

15. Ibic testified that he had no concerns about Complainant working while pregnant and stated that a pregnant woman can work as long as a physician allows. I do not credit his testimony.

16. Graham and Ibic both testified that in the late summer of 2008, all of Respondents' employees' hours were cut because of a slowdown in business. I do not credit their testimony.

17. Graham testified that Complainant's performance deteriorated during the course of her employment. He stated that Complainant told him she was not feeling well and refused to sweep or perform other tasks. Graham testified that he advised Ibic to terminate Complainant's employment because she was not adequately performing her job and Ibic followed his advice. I do not credit his testimony.

18. Ibic testified that as Complainant's pregnancy progressed, her performance declined. Ibic's testimony in this regard was vague. However, after repeated questioning about what aspects of Complainant's performance declined, Ibic stated that she let the phone ring three or four times before picking up. I do not credit his testimony that Complainant's work declined.

19. Ibic's testimony regarding his role in Complainant's termination was contradictory. He first stated that he made the decision to terminate Complainant's employment without first discussing the matter with Graham. When asked why he terminated Complainant's employment, Ibic stated there was no reason and he did not terminate her employment. He stated that Graham might have terminated her employment because Graham was the manager. I find Ibic's testimony that he did not terminate Complainant's employment to be incredible.

Number of Employees

20. Respondent's payroll records for the period March 2008 through September 2008, list a maximum of five employees, including Ibic and Complainant, whose name first appears on the payroll journal for the week ending April 4, 2008. (Ex R-4)

21. Complainant testified that there were four to seven employees on each shift. Her co-workers included Gabino; a pizza maker named Arzu; a counter worker and pizza maker named Jeffrey and a delivery man and pizza maker named Ismael. Other co-workers included cashiers named Gina, Coral, Melanie, Anna and Jeffrey's sister, whose name she does not remember. Employees named Dan and Noam, along with Christopher Graham made deliveries (Ex. C-2) I credit Complainant's testimony as to the names and number of employees.

22. Complainant testified she and certain other employees received paychecks through Paychex, a third party company that performed payroll tasks for Respondents. Other employees were paid directly from the company's account or were paid in cash. Complainant was always paid by check. She testified that on four or five occasions she was asked to report the hours of certain employees to Paychex, but there were employees whose hours she was not instructed to report to Paychex. I credit her testimony.

23. Graham testified that seven to nine people worked at the Pizza Factory on busy nights. Graham was paid in cash. He claimed that new employees were paid \$5 per hour plus tips during a “provisional” period of 90 days, before going on the payroll.

24. Ibic testified that because of high turnover, he paid employees in cash during a two to three month provisional period, after which employees are added to the payroll. Ibic acknowledged that he employed employees named Jeff, Arzu, Noam, Christopher Graham and others, although their names did not appear in Respondents’ payroll records.

25. I find that Respondent, Florence Pizza Factory Corp. employed six or more employees and thus is an employer within the meaning of M.G.L.c.151B §1.

Damages

26. Complainant testified that when Ibic began telling her she was too big and could no longer do the job, she felt embarrassed, ashamed, anxious and discouraged, because she knew she was capable of continuing to work and perform all her duties. She testified that she was so upset that she cried, suffered from insomnia, nausea, anxiety and had difficulty concentrating on her studies. I credit her testimony.

27. During her employment at Pizza Factory, Complainant was living with her boyfriend and another roommate, with whom she shared rent and utilities. Her boyfriend, Thomas DeJesus testified he and Complainant were working out the “kinks” of living together and were considering the options of moving to a more affordable apartment or temporarily moving in with Complainant’s mother after the birth of their baby. DeJesus took on Complainant’s share of expenses after her employment was terminated and they fought, primarily about finances. He

stated that after her termination, Complainant was depressed and was unable to find another job. I credit his testimony.

28. Complainant testified that after her termination, she continued having difficulty concentrating on her studies. She moved in with her mother sometime around mid-November 2008, after fighting with DeJesus over finances. According to Complainant and her mother, a baby shower thrown by her godmother the day after she moved was not the happy occasion she had envisioned. It was instead an embarrassing and unhappy event because DeJesus was not present. I credit their testimony.

29. Complainant's mother, Janice Beetle Godleski, testified that Complainant often called her, in tears, to relay her difficulties at her employment with Ibic after she became pregnant. Godleski testified that after her termination, Complainant was anxious and concerned about the financial impact of losing her job. According to Godleski, Complainant was depressed, embarrassed and ashamed that she had to move back in with her mother and was discouraged that she could not support herself and her child. I credit her testimony.

30. Complainant testified that from the time of her termination until the week before she delivered her baby, she sought out employment at other restaurants but she was unable to find work. On approximately December 4, 2008, Complainant was placed on bed rest by her doctor. After delivering her baby a week later, Complainant did not seek work for five weeks because she was going to school full time and caring for her baby. I credit her testimony.

31. Five weeks after giving birth, Complainant returned to school full-time and looked only for part-time evening work. Complainant completed her studies in July 2009.

32. In August 2009, Complainant began working 20 hours per week at Alternative Health in Northampton, performing body wraps, and counseling clients on weight loss and dieting. She earned \$225 per week at this position.

33. Complainant obtained her certification as a medical assistant in February 2010.

34. Complainant collected unemployment benefits of \$119.00 per week for 11 months.

35. I find that but for the reduction in Complainant's hours and her termination from Respondent, she would have earned \$4,481.20, based on an average weekly income of \$248.96 for the 18 weeks beginning August 1, 2008 until she went on bed rest on December 4, 2008. Complainant did not seek work for a six week period from December 4 through January 15, 2009.

36. From January 16, 2009 through July 31, 2009, a period of 16 weeks, Complainant would have earned \$6,970.88 had she resumed working at Pizza Factory.

37. I find that Complainant's period of eligibility for back pay ended in August 2009 when she secured a position in the health field at Alternative Health and no longer sought employment as a restaurant worker.

38. I find that Complainant lost income of \$11,452.08 prior to considering interim earnings and unemployment compensation. ($\$4,481.20 + \$6,970.88$) From August 2008 through July 31, 2009, Complainant earned approximately \$1,077.25 in wages and received unemployment compensation of \$5,712.00 ($\119.00 per week x 48 weeks) Subtracting her unemployment benefits and other interim earnings from August and September, an amount of

\$6,789.25 (\$5,712 + \$1,077.25), I find she is entitled to lost wages in the amount of \$4,662.83 (\$11,452.08 - \$6,789.25)

III. CONCLUSIONS OF LAW

A. Jurisdiction

Pursuant to M.G.L., chapter 151B, Section 1(5), the term employer "does not include... any employer with fewer than six persons in his employ..." Respondent alleges that it employs fewer than six people, as demonstrated by its payroll records showing from three to five employees. However, Complainant testified credibly that she worked with a crew of at least five other employees each shift and that many employees were paid in cash. Ibic and his witness Christopher Graham both acknowledged that Respondents paid employees in cash and identified many of the employees named by Complainant as employees of Respondent. I therefore conclude that there is ample evidence that despite its payroll records, the Pizza Factory employed more than six individuals at the time of Complainant's termination and is an employer within the meaning of G.L.c. 151B,§1.

B. Discrimination

M.G.L. Chapter 151B, §4(1) makes it an unlawful practice to discharge an employee because of her sex. "Pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled

pregnancy because of fears of further absences and coverage during leave deemed unlawful sex discrimination)

An employer may not require a pregnant employee to stop working because of its concern about safety to the fetus. In striking down an employer's "fetal protection policy", the Supreme Court stated that "an employer may take into account only the woman's ability to get her job done... The decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself." International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., 499 U.S. at 204, 205-6, 111 S. Ct. at 1206, 1207(1991). An employer may not, therefore, use a woman's pregnancy...as a reason for an adverse job action, such as refusing to hire or promote a woman or for discharging her, laying her off, failing to reinstate her or restricting her duties. An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if she is willing to continue working." Massachusetts Commission Against Discrimination, Maternity Leave Guidelines, VI. Sex Discrimination Issues Arising Under M.G.L. c. 151B, MCAD & Kristin DiAngelo v. Joseph Pandiscio, Jr. & Joseph's Bistro & Pub, Inc., 30 MDLR 52, 57 (2008)

In order to prove sex/pregnancy discrimination, Complainant must first establish a prima facie case. The complainant may prove a claim of discrimination by presenting direct evidence of discrimination or by utilizing the three-stage order of proof articulated in both federal and state court decisions. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). I conclude that Complainant has established a prima facie case of discrimination based on her pregnancy. Complainant has established that after

informing Ibic of her pregnancy, he made comments about her size, expressed concern about her ability to perform her job, reduced her hours and terminated her employment while she was pregnant. Complainant has thus presented direct evidence of sex discrimination on the basis of pregnancy.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). Respondents deny that Complainant's pregnancy was a factor in the decision to reduce her hours and terminate her employment. They assert that all of Respondents' employees' hours were reduced because of a decline in business. Respondents also assert that Complainant's employment was terminated because of a decline in her performance. Graham stated that Complainant refused to perform certain tasks and Ibic testified that she failed to promptly answer the telephone. Respondents have thus met their burden of articulating a legitimate, nondiscriminatory reason for their actions.

Once Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Notwithstanding, Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. Id; Abramian, 432 Mass at 117. The evidence supports Complainant's contention that Respondents' articulated reasons were a pretext for discrimination and that she was terminated because of her

pregnancy. Respondents produced no credible evidence to support their assertion that Complainant's job performance suffered or that her hours were reduced because of a slowdown in work. Given Respondent's comments about her appearance and repeated requests that she cease working because the baby was coming due, I find that these reasons were false and not the real reason for Respondents' action.

I conclude that Respondents' articulated reasons of poor performance were fabricated and that Complainant's pregnancy was the real reason for her termination. Thus I conclude that Respondents' actions were motivated by unlawful discriminatory animus and not by lawful considerations as they contend.

C. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they "interfere with a Complainant's right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that Mr. Ibic had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Mr. Ibic individually liable for unlawful discrimination. Mr. Ibic was the ultimate decision-maker with respect to terminating Complainant's employment. The evidence firmly

established Mr. Ibic's intention to discriminate and to interfere with Complainant's rights under c. 151B. I conclude that Mr. Ibic is individually liable for unlawful discrimination in this matter.

I conclude that Respondents engaged in unlawful discrimination on the basis of gender/pregnancy in violation of M.G.L.c.151B§4 and I find them jointly and severally liable for unlawful discrimination.

IV. REMEDY

Pursuant to M.G.L. c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from

circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Complainant testified that when Ibic began to comment negatively about her pregnancy, she was embarrassed, ashamed, anxious and discouraged. She was so upset that she cried, suffered from insomnia, nausea, anxiety and had difficulty concentrating on her studies. In the weeks leading up to her termination and thereafter, her relationship with her boyfriend suffered and she had difficulty concentrating on her studies. Following an argument with her boyfriend, she moved in with her mother, where she lived for approximately one year. The financial stress, the disruption in her relationship, and the move caused her to be depressed, embarrassed and ashamed. A baby shower given for her the day after she moved out was embarrassing because her boyfriend was not present.

While I credit Complainant’s testimony that Respondents’ discriminatory treatment caused her emotional distress, I am not convinced that this was the sole source of her distress. I believe that other stressors in her life included a relationship with her boyfriend that was not stable, Complainant’s beginning a full-time school program and uncertainty about her financial and living situation after the birth of her baby. I nonetheless conclude that a portion of her distress is a direct result of discriminatory treatment by Respondent and the loss of her job, and I award her damages for emotional distress in the amount of \$20,000.00.

B. Lost Wages

I conclude that Complainant is entitled to lost wages from August 2008 until July 31, 2009, except for six week period in which she did not seek employment around the birth of her child. I conclude that Complainant’s period of eligibility for back pay ended in August 2009

when she began a position in the health care field at Alternative Health and no longer sought employment as a restaurant worker.

If Complainant's hours had not been reduced and had she not been fired, she would have earned \$4,481.20, based on an average weekly income of \$248.96 for 18 weeks beginning August 1, 2008 until she went on bed rest on December 4, 2008. Complainant did not seek work for a six week period from December 4 through January 15, 2009. From January 16, 2009 through July 31, 2009, a period of 16 weeks, Complainant would have earned \$6,970.88 had she resumed working for Respondent. Complainant lost income totaling \$11,452.08 prior to factoring interim earnings and unemployment. ($\$4,481.20 + \$6,970.88$) From August 2008 through July 31, 2009, Complainant earned approximately \$1,077.25 in wages and received unemployment compensation of \$5,712.00 ($\119.00 per week x 48 weeks) Subtracting the total of her unemployment benefits and her income from August and September, \$6,789.25($\$5,712 + 1,077.25$), Complainant is entitled to lost wages equal \$4,662.83 ($\$11,452.08 - 6,789.25$)

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from engaging in discrimination on the basis of gender and pregnancy.

3. Respondents pay to Complainant the sum of \$20,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. Respondents pay to Complainant the sum of \$4,662.83 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 8th day of February 2012.

JUDITH E. KAPLAN,
Hearing Officer